Case No EA-2019-001201-LA (Previously UKEAT/0126/20/LA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 July 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MISS B SZYMONIAK	**Appellant**
- and -	
ADVANCED SUPPLY CHAIN (BFD) LTD	**Respondent**

- -
- -

Mr E Brown (instructed by Advocate) for the **Appellant**
Mr Matthew Curtis (instructed by Gordons LLP) for the **Respondent**

Hearing date: 1 July 2021

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JUDGMENT

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PRACTICE AND PROCEDURE

The employment tribunal erred in striking out a claim of constructive unfair dismissal at a preliminary hearing. The claimant alleged that multiple incidents occurred over a period of about ten months which together amounted to a cumulative breach of the implied duty of trust and confidence. There were a number of material disputes of fact. The tribunal cited, but failed to apply, the stringent test for a strike out. The tribunal failed to keep in mind that failure to resign in response to earlier incidents may not be fatal to such a claim, if there are then further incidents that could also contribute to a breach of the implied duty: **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1. Taken at its highest, the complaint was arguable and could not properly have been struck out.

The tribunal did not, in all the circumstances of the case, err in refusing an application to amend, in respect of a complaint of sexual harassment that was discrete and significantly out of time. The tribunal did err in refusing an application to amend in respect of a complaint of victimisation, including by constructive dismissal. The factual conduct said to amount to a protected act (a grievance alleging sexual harassment), and the factual conduct said to amount to victimisation, were already pleaded. The claimant had not hitherto pleaded that that conduct was *because of* the protected act, which was an essential component of a complaint of victimisation. However, the tribunal failed to consider, or explain if it had considered, what the impact of allowing the amendment would be on the evidential scope of the claims and the hearing. The matter was remitted to the tribunal to consider the application afresh.

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HIS HONOUR JUDGE AUERBACH

Introduction and Factual Background

1. I will refer to the parties as they were in the employment tribunal as claimant and respondent. This is the claimant's appeal against a decision striking out her claim of constructive unfair dismissal and refusing applications to amend to add complaints of harassment related to sex and victimisation.

2. I start with the broad factual context. The claimant was employed by the respondent, a logistics and fulfilment company, from 2014. In February 2018 she received a verbal warning for absence and lateness. In March 2018 she contacted a member of the HR team raising concerns about her treatment by a new supervisor. In early April she complained to the head of HR, Ms Hickling, that she had been harassed by that member of the HR team at three meetings with him during March. The allegations included propositioning and sexual touching.

3. Ms Hickling launched an investigation during the course of which the claimant was informed that the alleged harasser was no longer employed by the respondent. In May, Ms Hickling's investigation concluded that the complaint was without foundation. She wrote a letter to that effect dated 22 May. There was later a dispute about whether the claimant was given that letter at the time.

4. In May 2018 the claimant was informed that her existing position was at risk of redundancy. However, following some further process, in June she was offered and accepted a new role of acting processing team manager and began working in it on a probationary basis. At the end of May 2018 the claimant received a written warning for absence and lateness. In August she received a final written warning for absence and lateness against which she unsuccessfully appealed. In September her trial period in the new position was extended for a further three months.

5. By a letter of 21 November 2018 the claimant resigned, giving notice to take effect on 30 November. That letter gave no reason for her resignation; but on 28 November she wrote to

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the respondent again at some length raising a number of allegations and issues relating to various matters said to have occurred during the period April to November 2018. She stated that she had had to leave the employment due to work-related stress and she sought compensation and a meeting.

6. In January 2019 the claimant contacted Ms Hickling requesting information about her sexual harassment complaint. In the correspondence, she indicated that she had not previously received the May 2018 outcome letter. Ms Hickling's position was that it had been given to her by hand at the time; but in February 2019 she provided the claimant with a copy of it.

The Tribunal Proceedings

7. Solicitors for the claimant presented a claim form on 8 March 2019. In section 8.1 the boxes were ticked for: "I was unfairly dismissed (including constructive dismissal)" and "I am making another type of claim which the Employment Tribunal can deal with". In respect of the latter, and in the box for the background to the claims, reference was made to an attached witness statement. It appears that that was not in fact attached, but it was subsequently provided.

8. The statement included the claimant's account of the alleged harassment in March 2018, of Ms Hickling having concluded that her allegations were unfounded and the claimant having been informed that the alleged harasser had resigned. It also gave an account of various other episodes and incidents spanning a period from January to November 2018. These included the claimant being rejected for a supervisory role in January, being denied the opportunity to attend a health and safety course in February, and not being provided materials as promised from a course that she had been unable to attend in March. She also complained that she had been unfairly treated by the warnings over attendance and lateness, and the extension of her probation period in her new role. In October and November she had requested support when her team leader was on holiday, but this had not been given. The statement concluded by asserting that she had had issues with her line manager, her general manager, and HR, and that events had caused her continuing damage to her mental health.

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9. Grounds of resistance were entered which asserted that the claimant had not been dismissed but simply resigned. If she was seeking to make a complaint of sexual harassment based on the allegations raised in the April 2018 grievance, any such complaint was out of time. The document gave the respondent's account of the claimant being placed at risk of redundancy but then moved to an alternative role. It referred to the disciplinary history in relation to absence and attendance issues up to the final written warning in August, unsuccessfully appealed in September.

10. The grounds of resistance also referred to the claimant's letter of 28 November 2018 and to the contents of a response to that on 13 December, for further particulars of the respondent's position in relation to matters raised in the claim that had also been raised in the November letter. It denied any repudiatory breach of contract on the part of the respondent and maintained that, despite her poor disciplinary record, the claimant had at all times been treated fairly, respectfully and supportively.

11. On 6 June 2019 the parties were sent an order of EJ Davies. This required the claimant by 13 June to "confirm the basis on which she says she was dismissed and why that was an unfair dismissal" and to "confirm whether she seeks to advance any other type of claim". A preliminary hearing (PH) was fixed for 4 July, among other things to clarify the claims and to consider whether any of them should be the subject of a strike-out order or a deposit order.

12. On 12 June 2019 solicitors for the claimant sent a document to the tribunal which stated that during the course of her employment she had suffered from the following:

> "a) Sexual harassment – complaints have been made to the management whom have ignored the claimant, was told that the matter was dealt with in house, the claimant never reported to the police, we advised the claimant to report the matter to the police the former employees discouraged her to report the matter (please see exhibit marked BS 1)
>
> b) Constructive Dismissal/Discrimination – The claimant has various grievances that management was aware of (see letter of the 21st of November attached marked BS 2) as a result of the continued harassment, the claimant was left with no option other than to hand him her notice, she was driven to do this.

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> c) The Claimant claims that she was always singled out (a few examples are on the letter attached[])]
>
> d) Bullying and Harassment - the Claimant claims stress in the work place, and is undergoing extensive therapy with Mr Ashraf and is on medication.
>
> e) Loss of Earnings – The Claimant is unable to find suitable employment due to her mental wellbeing.
>
> f) Loss of Pension."

13. The document also asserted that the claimant had been unable to provide clear instructions as she had had a mental breakdown. Attached to the document was what appears to have been an early draft of the 28 November 2018 letter, dated 21 November 2018.

14. On 4 July 2019 a PH took place before EJ Lancaster. Both parties were represented. The minute recorded that it had not proved possible to clarify the issues or make orders as envisaged by the order of EJ Davies. The hearing was adjourned and relisted to 28 August 2019 on which occasion the tribunal would also consider any application to amend the claim and whether time should be extended in respect of any claims to be added.

15. The judge observed, in respect of the materials provided on 12 June, that it was conceded that the particulars of unfair dismissal were inadequate. The judge continued:

> "2. … There is, however, for the first time, specific reference made to "sexual harassment" and Mr Wiltshire confirmed today that it is intended to bring a complaint under section 26 (2) of the Equality Act 2010. Mr Wiltshire has also indicated today an intention to seek to amend further to add complaints of public interest disclosure detriment (or victimisation under [section] 27 of the Equality Act) arising out of the grievance raised in respect of the alleged sexual harassment."

16. The judge observed that the harassment complaint was significantly out of time, the last alleged act having been on 28 March 2018, but noted also the factual dispute as to whether the claimant had received the grievance outcome letter dated 22 May at that time. The judge directed the claimant to present a fully particularised draft amended claim, together with any formal request in writing to amend the claim and any witness statement relied on in support her argument that it would

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be just and equitable to extend time, by 22 July 2019. The respondent was then to provide any witness statement in response on the time point and any submissions objecting to the application to amend.

17. On 22 July 2019 the claimant's solicitors served a further and better particulars document. This asserted that the matters complained of in the claim form statement together amounted to a cumulative breach of the implied duty of trust and confidence, with the last straw being a failure to support the claimant on 8 November 2018 when her team leader was on holiday. The allegations of sexual harassment were as set out in paragraph 1 of that statement. I interpose that paragraph 1 had given an account of the three alleged incidents involving the HR manager in March 2018.

18. As to victimisation, the protected act was said to be the April grievance about that alleged harassment, and the detrimental treatment was said to be all the various conduct from thereafter up until November, referred to in the original particulars. It was alleged that the respondent had thereby been seeking to manage the claimant out of the business. As to limitation, in respect of any act or omission that was not a continuing act, it was just and equitable to extend time and "any such claim is additional to and overlaps with the constructive dismissal complaints presented within time".

19. At the same time the claimant's solicitors served an application to amend the particulars of claim to include claims of harassment related to sex and victimisation. After referring to **Selkent Bus Co Limited v Moore** [1996] ICR 836 EAT and **Cocking v Sandhurst (Stationers) Limited** [1974] ICR 650, a section dealing with the sexual harassment claim began as follows:

> "4. The Claimants [sic] ET1 does not specifically bring a claim for Sexual Harassment however the first paragraph of her statement attached to the ET1 outlines the acts of Sexual Harassment complained of. The Claimant is clearly not attempting to introduce a new factual matrix to her claim. This is a case of re-labelling of an existing claim following appropriate advice on the way such a claim must be pleaded."

20. It went on to suggest that, as there had been an investigation at the time, the respondent would not be disadvantaged by the passage of time, and referred to the claimant's witness statement as to why it would be just and equitable to extend time. As to victimisation, it was said that the

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respondent's dealings with the claimant changed after she made the sexual harassment allegations. She relied on all the matters after that date raised in her claim form. The last act of victimisation was on 8 November 2018, so that, had a victimisation claim been identified in the claim form itself, it would have been in time. This was said to be a case of re-labelling in circumstances where the claimant had struggled to articulate her victimisation claim previously at a time when she was unwell. It was said again that she had suffered some form of nervous breakdown in February 2019.

21. On 5 August 2019 the respondent tabled an objection to the application to amend, supported by a witness statement from Ms Hickling stating that she had personally hand-delivered the grievance outcome letter to the claimant on 22 May 2018.

The Decision Under Appeal

22. There was a PH on 28 August 2019 before EJ Shulman. Both parties were represented. In a reserved decision the judge struck out the claim of unfair dismissal and refused both the amendment applications. After reciting the history of the litigation and setting out the law, including pertinent authorities, section 5 of the tribunal's reasons was headed "Facts" but it then had the subheading:

> "In so far as these could be ascertained after careful review of oral evidence and from the bundle agreed for this hearing, the Tribunal records the following as being relevant to those matters and/or the applications before it."

23. The tribunal listed each of the allegations of treatment of which the claimant complained in the period from January to November 2018, interpolating the respondent's brief position in response. The tribunal set out the warnings that the claimant had received over matters of absence and lateness. It set out the substance of the claimant's allegations of sexual harassment and the material before it regarding the dispute about whether she had received the 22 May 2018 letter at the time. It referred to the claimant saying that she had suffered from mental health problems from around September 2018, but stated that it considered that the letters provided to the tribunal did not provide support for that contention. The tribunal noted that the claimant had instructed solicitors in March

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2019, but that no claim of sexual harassment had appeared in the claim form lodged by them. The tribunal also noted that the alleged perpetrator had left the respondent's employment in April 2018.

24. Regarding victimisation, the tribunal noted that the protected act relied upon was the grievance and that all of the subsequent treatment complained of was relied upon, with the alleged last straw being on 8 November 2018. There was no sign of such a claim in the claim form. It only emerged as a possibility on 4 July, then confirmed in the application to amend of 22 July 2019. The tribunal listed the detrimental treatment complained of, noting which matters were factually disputed.

25. Section 6 was headed "Unfair dismissal – matters arising during the hearing and observations." The tribunal said that the claimant had never specifically raised a grievance or grievances about alleged breaches of contract. The main grievance related to the sexual harassment, and was lodged on 3 April 2018. There was a letter of 31 May 2018 about that but no copy was before the tribunal. The letter of 28 November was sent "only two days before the claimant's contract was terminated and after notice had been given". Save for the instances of alleged sexual harassment in March 2018, the claim form did not instance any bullying and harassment in the wider sense.

26. At paragraph 6.3 the tribunal said this:

> "Are the matters referred to in paragraphs 1 to 40 of the statement attached to the claim form breaches? If so, to what extent have they been affirmed? By a reference to the paragraph numbers mentioned above are they or any of them breaches? In answer paragraph 5.1.1 if true would be a breach. Otherwise were the remainder? As to affirmation, paragraph 5.1.1 the Claimant waited eight months before resigning, albeit without reason and on the Claimant's version without the outcome of her grievance."

27. I interpose that paragraph 5.1.1 referred to the allegations of sexual harassment in March.

28. Under the heading "Sexual harassment - matters arising during the hearing and observations", in relation to "time", the tribunal noted that Eatons solicitors did not appear to have advised the claimant on limitation. She appeared to have been wrongly advised by her union that the limitation

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period was three years. MHK solicitors, who issued the claim form, did not issue a claim for sexual harassment. Of more importance than action or inaction by her advisers was the claimant's inaction:

> "7.1. … Here on the Claimant's version was a very unpleasant experience and yet on her version she let it run on for months whilst continuing employment and went to two firms of solicitors and her union, obviously failing to communicate that unpleasantness in an untimely manner, only making her application for leave to amend on 22 July 2019, 16 months after the event. …"

29. The claimant had the information to lodge the claim much earlier, and should have done so.

30. As to victimisation the tribunal observed that time started to run on 8 November 2018 and it was not clear whether the lawyers instructed after that date had instructions on that matter. Other solicitors had been instructed since proceedings were issued, but leave was not applied for until 22 July, seven-and-a-half months after the claim arose. There seemed to be no explanation as to why it took so long to issue the claim.

31. Section 9 is headed: "Determination of the issues (after listening to the factual and legal submissions made by and on behalf of the respective parties)". The first sub-section reads:

> "9.1. Unfair dismissal - strike out/deposit order
>
> 9.1.1. Whether or not the claim has little reasonable prospect of success or not, the Claimant's ability to pay any consequent deposit order is in question having regard to the evidence as to her means. The Tribunal must therefore consider whether or not there is no reasonable prospect of success. If there is none it may strike out the claim. If there is more than no reasonable prospect of success the claim must go through to a full hearing.
>
> 9.1.2. At the hearing before Employment Judge Lancaster on 4 July 2019 the learned Judge recorded that it was conceded by the Claimant that the particulars of the unfair dismissal claim were inadequate. The Tribunal is unable to see that the further and better particulars added enhanced view which was put by the learned Judge.
>
> 9.1.3. The Tribunal takes into account the decision in **Tayside**, so that there have to be most exceptional circumstances to justify a strike out, but the Tribunal also takes into account that this is not a case where dismissal is admitted and the onus is clearly on the Claimant to prove that she was entitled to terminate her contract by reason of the Respondent's conduct.
>
> 9.1.4. The Tribunal has carefully set out the alleged facts which form the basis of the Claimant's claim. In nearly every case the Respondent disputes the allegations,

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including the allegation at the outset of sexual misconduct. It is clear that after that alleged incident the Claimant let matters run on, on her version, without an answer to her grievance and without her pressing for an answer for her grievance. Is there more than no reasonable prospect of success that the Claimant could prove such conduct by the Respondent?

9.1.5. If this case went to a full hearing it could be a case where the "last straw" doctrine would be applied. The alleged last straw is referred to at paragraph 5.1.14 above. It is an alleged incident, where the Respondent says that there was no complaint, but more importantly the Claimant's resignation letter was silent on the point. **Omilaju** says that the last straw does not have to be of the same character as earlier acts and does not necessarily have to constitute unreasonably or blameworthy conduct, although in most cases it will do. However the last straw must contribute however slightly to the breach of the implied term of trust and confidence. Is there more than no reasonable prospect of success in considering whether the last straw satisfies **Omilaju**?

9.1.6. The allegation of sexual harassment is by far the most serious allegation of all those set out at paragraph 5.1 of this Judgment, but not only did the Respondent reject it, the Claimant does not in her claim attack the nature of the investigation once she had the decision, whenever that might have been.

9.1.7. The Tribunal will not rehearse paragraphs 5.1.2 to 5.1.14 of this decision save to say that in most cases the Respondent takes issues. Just as importantly, in an unfair dismissal case there is the Claimant's disciplinary record, which the Claimant does not deny. It is set out at paragraph 5.2 of this decision. At the time of the termination of the Claimant's employment there was a live final written warning, which had been appealed and the appeal was turned down. This written warning and a poor disciplinary record in 2018 would no doubt be considered as against the Respondent's conduct. Would such a record not contribute when considering whether there was more than no reasonable prospect of success?

9.1.8. The Tribunal has also considered in the context of the Respondent's conduct that it saved the Claimant from redundancy and that (barring her poor attendance record) in September 2018 she was described as a key member of the team and that her performance was excellent.

9.1.9. The key allegation so far as the claim for unfair dismissal is concerned is the alleged (but disputed and investigated) claim of sexual harassment. It is true that the Claimant raised a grievance, but on her version she left it eight months before resigning, without giving in writing the reason for resignation and surprisingly on her version without pressing for the outcome of her grievance.

9.1.10. Further the Claimant pleads her medical condition, there being no evidence of it to November 2018.

9.1.11. In all the circumstances, which the Tribunal is of the view are sufficiently exceptional, the Claimant's claim of unfair dismissal has no reasonable prospect of success and is hereby struck out."

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32. Under the heading: "Sexual harassment - leave to amend", the tribunal noted again that it was at the hearing on 4 July that the claim of sexual harassment was raised for the first time, when it was noted that it was already significantly out of time. The tribunal observed of that hearing:

> "9.2.1. … The learned Judge stated that the evidence could well have a bearing on whether it might be just and equitable to extend time (which is not the subject of this application but is relevant in deciding whether or not leave should be granted to amend). …"

33. Referring to the **Selkent** guidance, of particular relevance were time and delay.

34. The tribunal then recapped on the evidence about whether or not the grievance outcome letter had been provided in May 2018. Regarding mental ill-health in September there was no relevant evidence before the tribunal. The tribunal noted again that the alleged perpetrator was no longer in the respondent's employment, and the position regarding availability of legal advice. The tribunal had been referred to **Virdi v Commissioner of Police of the Metropolis** [2007] IRLR 24, but the present case was very different, because of the claimant's inaction over a long period.

35. The tribunal found that the claimant *did* receive the outcome letter by hand on 22 May 2019, so there was even more reason for her to have taken action earlier. The tribunal concluded:

> "9.2.12. Leave to amend the claim form by adding a claim of sexual harassment is refused mainly on the grounds that much time has passed for leave to be granted to extend time, but also because there is no reasonable explanation for the delay …"

36. The tribunal then considered the application for leave to amend in relation to victimisation, noting that this claim surfaced as a possibility on 4 July 2019, describing it as an entirely new allegation and stating that it should have been intimated by 13 June 2019 as ordered by EJ Davies. The claim, said the tribunal, appeared to be four months out of time. The tribunal continued:

> "9.3.5. The law relating to leave to amend is the same as relates to sexual harassment and is again set out at paragraph 4.4 of this decision. Although out of time the real issue in this case is that this is not a mere re-labelling. Time is however relevant, as is the lack

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> of explanation for a delay, failure to issue promptly, steps taken by the Claimant to take advice, noting the case of **Virdi**."

37. The tribunal then went on to refer to a number of other features, including the claimant during the period covered by the alleged detriments having been saved from redundancy and subsequently praised for her work, and the respondent taking exception to a number of the alleged detriments. The tribunal referred again to the warning the claimant had received in May 2018 which was not appealed, and her timekeeping being a matter that was still receiving attention. The tribunal referred again to the degree to which the proposed claim was out of time, and that it was a new claim; and said that it was late without reasonable explanation. That application to amend was also refused.

The Grounds of Appeal and the Arguments

38. The claimant presented a notice of appeal as a litigant in person. At a PH at which Mr Brown appeared for her under the ELAAS scheme the following grounds were permitted to proceed:

> "**Ground 1: The Tribunal's decision to strike out the Appellant's unfair dismissal claim was perverse and/or wrong in law**. The Tribunal did not give reasons, or sufficient reasons, for its determination. To the extent that it gave reasons, the Tribunal relied on determinations or factors that were legally erroneous. The Tribunal in fact resolved core disputed matters rather than simply taking the core allegations regarding the unfair dismissal claim at their highest. The Tribunal was also wrong to think that the Appellant never specifically raised grievances about alleged breaches of contract in light of the content of her grievances in relation to sexual harassment and generally. The Tribunal was wrong to rely on irrelevant considerations, such as that the Appellant's allegations were disputed by the Respondent.
>
> **Ground 2: The Tribunal's decision not to allow the application to amend the claim to include a claim for sexual harassment was perverse and/or wrong in law**. The sexual harassment allegation concerns the specific acts of harassment by the identified perpetrator, and, moreover, the Respondent's toleration of the same (despite complaints being made by the Appellant and others) and failure to investigate those acts. The Tribunal failed to apply the appellate authorities and focused on limitation rather than all of the factors set out in **Selkent Bus Company v Moore** [1996] ICR 836 and the 'relabelling' factor in particular. In any case, Tribunal erred as to the date when the limitation period started to run, because he failed to recognise that the sexual harassment claim constitutes an act continuing over a period of time culminating in (constructive) dismissal under section 123 of the **Equality Act 2010** (with the dismissal itself being in time). The Tribunal wrongly failed to consider that the sexual harassment allegation is in substance pleaded in the ET1 and its supporting statement.

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> **Ground 3: The Tribunal's decision not to allow the application to amend the claim to include a claim for victimisation was perverse and/or wrong in law**. The Tribunal wrongly failed to consider that the victimisation allegation was in substance pleaded in the ET1 and its supporting statement, with the effect that the amendment re-labelled allegations that had been pleaded from the outset. The Judge was wrong to rely on irrelevant considerations, such as that the Appellant's allegations were disputed by the Respondent. The Tribunal was wrong to conclude that the allegation was out in time and the substance of ground 2 is repeated in application to the victimisation complaint.
>
> **Ground 4: The Tribunal's failure to give reasons as to why the Appellant lost was wrong in law**. The Judge's failure to explain sufficiently or cogently with proper reasons to the Appellant why she lost is an error of law itself."

39. It seems to me that ground four effectively adds a *Meek* strand to the other grounds, which I will consider with them. I summarise now what seem to me to have been the most significant submissions on each side, either in the skeletons or as developed orally before me this morning.

40. In relation to ground 1 Mr Brown cited from a number of authorities. In **Tayside Public Transport Co Limited v Reilly** [2012] CSIH 46, the Court of Session said:

> "30. … In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore, where the central facts are in dispute, the claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts … There may be cases where it is instantly demonstrable that the central facts of the claim are untrue … But in the normal case where there is a "crucial core of disputed facts", it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out …"

41. In **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 it was said that disputed allegations could nonetheless be struck out in a case where the facts alleged were totally and inexplicably inconsistent with undisputed contemporaneous documentation.

42. Mr Brown also cited from **Romanowska v Aspirations Care Limited** UKEAT/0015/14:

> "1. … Sometimes it may be obvious that, taking the facts at their highest in favour of the Claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward. Where, however, there is a dispute of fact, then unless there are good reasons, indeed powerful ones, for supposing that the Claimant's view of the facts is simply unsustainable, it is difficult to see how justice can be done between the parties without hearing the evidence in order to resolve the conflict of fact which has arisen."

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43. The tribunal had failed to give clear reasons for concluding that the unfair dismissal claim had no reasonable prospect of success. Along the way to that conclusion, it posed a number of questions, but it did not go on expressly to answer them. If the questions were rhetorical, that was an inadequate form of reasoning. The tribunal appeared to have relied on the existence of disputes of fact, including as to whether the claimant had been sexually harassed, as supporting the conclusion that the claim was not reasonably arguable. It purported to make findings of fact, but should not have done so in the context of a strike-out application. That included finding that the claimant had not attacked the nature of the investigation into the sexual harassment allegations and that she had been described in September 2018 as a key member of the team whose performance was excellent.

44. The tribunal should have taken the claimant's case at its highest, which was that the various matters she relied upon *had* happened as she asserted and that, taken together, they contributed to a cumulative breach of the implied duty of trust and confidence. The tribunal was wrong to criticise the lack of medical evidence when disclosure in the case had not yet been ordered. The tribunal's overall findings did not meet the high threshold test for a strike-out. Furthermore, in paragraph 6.3, when the tribunal posed questions about breach and affirmation, it appeared to accept that the sexual-harassment allegations, if well-founded, would demonstrate a breach, but failed to consider whether there was an arguable case of cumulative breach up to the point of resignation, which was not waived.

45. The tribunal was also wrong to assert that the claimant had never specifically raised grievances of breach of contract, as her complaint about the alleged sexual harassment surely was a complaint of such a breach. The tribunal recognised that the sexual harassment allegations were very serious but then downplayed them because the internal investigation had not upheld them and they had been disputed. It relied too heavily on the claimant not having pursued them thereafter whilst remaining in employment for many months. It had heard no evidence about her allegations.

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It could not properly be said that, taken at its highest, her case that there had been a cumulative breach of contract which she had not affirmed, was not reasonably arguable.

46. In relation to ground 2, the application to add a complaint of sexual harassment was rejected on the basis that it was substantially out of time and that there was no sufficient explanation for the delay. But the tribunal failed to take into account that this application involved no more than a re-labelling, all the factual allegations having been clearly set out in the supporting statement referred to in the original particulars of claim. The claimant had confirmed, as ordered by EJ Davies, that she was seeking to rely on those factual particulars. Although in the claim form she had not used the term "sexual harassment", that was clearly the nature of those factual allegations.

47. The tribunal also failed to take account of the fact that the proposed claim was of a continuing act in the sense understood in **Hendricks v Metropolitan Police Commissioner** [2003] IRLR 96. It was founded not only on the initial allegation of harassment by the HR manager, but on the allegation of continuing harassment by the respondent's failure properly to investigate and tolerance of that treatment up until the date of resignation. This had been referred to in the original supporting statement referred to in the claim form and in the June document.

48. Having had **McLeary v One Housing Group** UKEAT/0124/18/LA drawn to his attention, Mr Brown accepted that it is not possible to bring a claim of constructive dismissal by harassment under the **Equality Act** but said the allegations should have been construed as being of acts of harassment continuing up to around the time of the resignation, and so in time, had they been articulated in terms of the claim form. In any event, the amendment could and should still have been allowed on the basis that the limitation point could be left for consideration by the tribunal at the full hearing: see **Galilee v Metropolitan Police Commissioner** [2018] ICR 634.

49. The tribunal had also erred when it concluded that there was no reasonable explanation for the delay. There was an obvious explanation being that in the claimant's mind she had already raised

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this complaint in her claim form. The tribunal also, wrongly, took account of its view that the proposed claim had poor prospects of success on its merits. Having had **Gillett v Bridge 86 Limited** UKEAT/0051/17/DM drawn to his attention, Mr Brown accepted that this was potentially relevant, but submitted that excessive weight had been attached to it.

50. Turning to ground 3, the tribunal had erred in treating the victimisation complaint as entirely new. The factual basis could be found in the witness statement attached to the particulars of claim. He referred in particular to paragraph 14 in which the claimant said that, after raising her grievance and being told that the accused manager had left the respondent, she was made to feel that she was to blame for that. At paragraph 24 she had referred to a feeling of being victimised, and at paragraph 26 to being singled out. True it was that she had not pleaded in the original claim that the treatment complained of was because of the grievance, but she was not seeking to assert any new material facts. This should have been regarded as a case of re-labelling a claim which, had it been labelled as such in the claim form, would have been in time. The complaint could also properly be run, if allowed, as one of victimisation by constructive dismissal. Once again the judge was wrong in the approach delay, given that the claimant had said in her June statement that she had always intended to make the claim on the basis that she was singled out, bullied and harassed. Mr Brown also submitted that the judge had impliedly attached excessive weight to his view of the merits.

51. Mr Curtis made a general submission that the appeal amounted to a series of what were akin to perversity challenges. In relation to ground 1, whilst of course tribunals should be cautious about striking out claims at a preliminary stage, there were cases where this was appropriate. Here the tribunal had identified that the claim was based on a cumulative breach of the implied duty of trust and confidence, and the claimant's case as to the last straw. It had correctly directed itself, including referring specifically to **Tayside v Reilly** and **Omilaju v Waltham Forest London Borough Council** [2005] ICR 481 CA. Read in the round, the tribunal had sufficiently explained its reasons for concluding that this claim had no reasonable prospect of success. It had properly identified what

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matters were disputed by the respondent, precisely because it could not resolve such factual disputes at a PH. It had not generally purported to do that. Rather, the tribunal had taken the claimant's claim at its highest, referring, for example at paragraph 9.1.4, to her version of events.

52. The tribunal did make one finding of fact, as to whether the claimant had received the grievance outcome letter in May 2018, but it was proper to so, as witness evidence had been directed and provided on this specific, self-contained point which was of some significance for the applications before it. The tribunal was clearly cognisant that the claimant had complained about the alleged harassment, but its point was that she had not raised a grievance in relation to any other matters, or in relation to this matter *again*, until after she had given her notice. The tribunal had referred properly to a number of features of the case which presented obstacles. It was entitled to conclude that the cumulative effect of all the difficulties was that this complaint had no reasonable prospect of success.

53. In relation to ground 2, the tribunal properly referred to the fact that the claimant had received advice from one firm of solicitors in September 2018, and was represented by another when she issued her claim form. It was entitled to consider that both the factual basis and the complaints themselves should have been promptly and clearly identified much sooner. The tribunal could not be expected to trawl through all the different versions of the complaints. Citing **Chief Constable of Essex Police v Kovacevic** UKEAT/0126/13/RN he observed that the tribunal properly required the claimant to set out her case in a formal application to amend, and it properly focused on the contents of that application, as tabled on 22 July 2018. In that document, it was clear that the claimant was seeking to introduce an allegation of sexual harassment solely in relation to the alleged treatment conduct of her former HR colleague in March 2018. Further, the tribunal rightly attached weight to the fact that that application was made almost 16 months after the event.

54. The tribunal had also properly treated as relevant to the exercise of its discretion, the facts that the complaint was intimated for the first time on 4 July, and that the main witness for the respondent

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was no longer in its employment, the overall time that had elapsed since the acts complained of, and its conclusions that the claim could and should have been articulated and presented much sooner. The continuing-act point was not one advanced in the application to amend, so the tribunal could not be criticised for not considering it. It was in any case not arguable. This decision was a proper exercise of the tribunal's case management discretion and was not arguably perverse.

55. As to ground 3, the tribunal correctly identified that the victimisation claim had only surfaced for the first time on 4 July; and fairly made the point that it should have been intimated at the very least by 13 June following the order of EJ Davies. The tribunal was entitled to attach considerable weight to the delay, and lack of adequate explanation for it. This was not a mere re-labelling. There was no suggestion in the original claim statement that any treatment had occurred *because* the claimant had raised the sexual-harassment grievance. That causal link was an essential ingredient.

Discussion and Conclusions

56. As to ground 1, the decision to strike out the unfair dismissal claim plainly flowed from the tribunal's conclusion that there was no reasonable prospect of a finding of constructive dismissal. It was not disputed that the judge had given himself a correct self-direction as to the law in relation to the concept of constructive dismissal and as to the guidance in particular in **Tayside v Reilly** on the no-reasonable-prospect-of-success threshold in cases where there is a crucial core of disputed facts.

57. In section 5.1 of the decision the sub-bullet points are, it seems to me, a fair summary of the factual allegations made by the claimant in relation to those matters which, on her case, together contributed to a breach of the implied duty of trust and confidence, including her identification of the last straw. In the same passage, the tribunal noted some of the respondent's points of factual dispute, but without any observation at that point, as to the significance of such dispute. Similarly, the disciplinary record set out by the tribunal appears not to have been in dispute. Once again, however, at this stage in the reasons, the tribunal does not indicate what significance it attaches to this feature.

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58. I agree with Mr Curtis that, reading paragraph 6.1 as a whole, the point being made by the tribunal was that the claimant had not raised any internal grievance about any matters other than the allegation of sexual harassment, prior to tabling her letter of 28 November 2018. The tribunal acknowledged that some other complaint letter had been written on 31 May 2018 but, as no copy was before it, I do not think it was arguably wrong for the tribunal to have discounted it.

59. Paragraph 6.3 is, in my view, however, more problematic. The factual points made here: that the claimant did not resign in point of time until eight months after the alleged sexual harassment, and that the resignation letter itself did not set out any reason for resignation, appear factually not to have been disputed. However, the evaluation of a claim of *cumulative* breach of the implied duty of trust and confidence will, of necessity, involve a consideration of whether *all* of the conduct relied upon, taken as a whole, establishes a cumulative breach, even if one or more incidents might not amount to a breach in and of themselves.

60. Further, if, at a certain point a cumulative breach is established, what matters is whether there is affirmation of that breach, *after* that point. The fact that an employee has not resigned at an earlier stage, though she might have been entitled to do so, is also not necessarily fatal to her claim, if there are further incidents thereafter that could lend add something to a cumulative breach claim. See the discussion in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1. These points were not addressed by the tribunal at this stage of its reasons.

61. Further, in section 9.1 where the tribunal came to set out its conclusions on whether to strike out the unfair dismissal claim, the reasoning is, in my view, in a number of respects unsatisfactory. In paragraphs 9.1.4 through to 9.1.10 the tribunal raised a number of features which it plainly considered were at least potentially relevant to the claimant's prospects of establishing at trial that there had been a breach of the implied term which she had not waived. At a number of points, the tribunal poses questions to which it does not expressly provide answers. I agree with Mr Curtis that

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the natural reading is that these questions were raised in rhetorical fashion. That is to say, these questions conveyed the tribunal's view that the features to which they referred posed difficulties for the claimant's case, and that, taken together, the combined impact of these difficulties was that the overall prospects of success were so poor as to warrant the claim being struck out.

62. However, I do not agree with Mr Curtis that the tribunal properly reached its strike-out conclusion on the basis of such reasoning. That is for the following reasons.

63. First, at 9.1.4, the tribunal asked whether there was more than no reasonable prospect that the claimant would establish that the alleged sexual harassment had occurred. It pointed to the fact that the allegations were disputed and the fact that the claimant let matters "run on" until her resignation in November. However, the tribunal could not at this PH consider all the evidence that might be available at the full hearing about this allegation, including that of the claimant herself and whatever documentary evidence emerged from the internal investigations. That evidence would be available at trial, even if the respondent could not call the alleged perpetrator as a witness.

64. Further, at 9.1.7 the tribunal referred to the claimant's disciplinary record and the unsuccessful appeal against the final written warning. But, while the record as such was not disputed, the tribunal was aware that it was the claimant's case that she had been harshly and unfairly treated over matters of absence and lateness. Again, there were factual disputes that the tribunal was not in a position to resolve at this PH. The observation that the claimant's disciplinary record would "no doubt be considered as against the respondent's conduct" is also troubling, as it is not explained how the tribunal considered this could affect the conclusion on constructive dismissal as such, as opposed, perhaps, to being a matter going to remedy, should the unfair dismissal claim succeed.

65. As to the reference in paragraph 9.1.8 to the respondent having saved the claimant from redundancy and having described her performance as "excellent", once again, the essential facts appear not to have been disputed, as such; but it is not explained how the tribunal considered this

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relevant to the claimant's prospects of success in relying on *other* alleged conduct of the respondent as contributing to a fundamental breach. There is no consideration here, for example, as to which managers or other individuals were involved in the conduct of which the claimant complained, and in the conduct which the respondent relied upon as being supportive treatment of her.

66. At paragraph 9.1.5 the tribunal referred to the last straw relied upon, asking whether there was no reasonable prospect of it satisfying the **Omilaju** test. The last straw was said to be failure to support the claimant as requested when her team leader was away on leave. I cannot see on what basis the tribunal could at this PH have said that that allegation would have no reasonable prospect of success of being found to amount to a last straw, given the very generous threshold test set out in **Omilaju** in that respect, and that the tribunal heard no evidence about this matter.

67. It also appears that the tribunal considered that the issue of affirmation posed a real problem for the claimant, having regard to its reference to this in paragraph 6.3 and to issues touching upon affirmation in paragraphs 9.1.6 and 9.1.9. But the tribunal did not in this closing section consider the correct approach, being to establish first whether there in principle has been a cumulative breach by the overall conduct complained of, and only then whether *at that point* there has been affirmation, taking on board the **Kaur** analysis.

68. The tribunal then stated in paragraph 9.1 that the circumstances were sufficiently exceptional to warrant the conclusion that this claim had no reasonable prospect of success, referring to the guidance in the **Tayside** case. But there is no consideration here of the high threshold that **Tayside, Ezsias** and **Romanowska** all indicate applies; and no explanation of how the tribunal considers that the features it has mentioned do make this case exceptional.

69. The strike-out test is a stringent one. It was common ground before me that this was not a case where the claimant faced an obvious jurisdictional obstacle, such as short service, or where the respondent could rely on documents that demonstrated that a factual feature of her alleged case was

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demonstrably untrue. Nor was it suggested that the claimant's factual case, taken at its highest, was so deeply implausible as to be incredible or unsustainable. Mr Curtis accepted all of that, but said that there was no reason in principle why a tribunal could not properly conclude that a claim simply faced too many serious obstacles overall, such that it had no reasonable prospect of success.

70. My conclusion is this. The authorities do not purport to provide a closed list of types of case that can be struck out as having no reasonable prospect of success. But, bearing in mind that at a PH of this sort the tribunal does not hear or have the full evidence before it; it does need to be able to identify, in the given case, some sound basis on which it can be confident on the material before it that the claim has no reasonable prospect of success. In this case, the claimant complained of alleged treatment in a number of incidents occurring right up to shortly before she resigned. While she had not given reasons in the resignation letter, she set out her concerns in a letter written very shortly after. There were important factual matters that were disputed which the tribunal was not in a position to resolve at this hearing. The tribunal would need at trial to make factual findings about all the matters she relied upon, and whether, in light of the facts found, there was overall a cumulative breach, as of November, and whether, if so, it was waived prior to resignation.

71. I conclude that this is a case where reading the further particulars of claim, on the information available to the tribunal at this PH, and properly considering the claim at its highest, the tribunal could not properly have struck out the pleading that the claimant was constructively dismissed, and hence the unfair dismissal claim. I will therefore allow ground 1 and quash the decision to strike out the unfair dismissal claim. As I cannot see any proper basis on which this claim could have been struck out on the information available at the PH, I will not remit the strike-out question in this respect.

72. I turn to ground 2. The tribunal gave itself a proper self-direction on the law. Importantly, at 4.4.1 it correctly identified that it must have regard to all the relevant circumstances when considering an amendment application and the balance of injustice or hardship to both parties were it either to be

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granted or refused. As explained in **Gillett**, it was not wrong to consider the merits as such, though they have to be handled with care, because the tribunal will inevitably have limited information. Nevertheless, particularly where a proposed claim is potentially out of time, an appropriate assessment of the merits may be taken into account when considering an application to amend.

73. Whilst the claimant had referred to the alleged harassment in her original statement relied upon in the claim form, and I appreciate Mr Brown's point that the allegations were inherently of conduct of a sexual nature or relating to sex, EJ Lancaster had determined at the 4 July 2019 PH that the claim form did not assert a freestanding complaint of harassment related to sex, as opposed to simply raising allegations relied upon in support of the complaint of constructive unfair dismissal. At the PH in the EAT Lavender J determined that, as EJ Lancaster's decision had not been appealed, this point could not be reopened in the current appeal. Lavender J's decision on that point has itself not been challenged. Mr Brown therefore fairly accepted this morning that he could not revisit this aspect of matters. In view of all that, the starting point now is that EJ Shulman was right to take as *his* starting point that this was a new legal complaint as such, which did require permission to amend.

74. It is clearly established that the fact that a proposed amendment would, had it been presented as a fresh claim at the same time have been out of time, is not a knock-out blow when the application is one to amend. The tribunal is also not obliged to determine the time point at the same time as determining the amendment application. There is no doctrine of relation back, and sometimes the tribunal can, or indeed should, leave the time point to be resolved at the full hearing: see **Galilee** and **Reuters v Cole** UKEAT/0258/17/BA.

75. However, a time point of this sort is a factor that can be properly weighed in the balance when deciding whether to allow the application to amend. In this case, the time point had been identified for consideration at this PH and indeed witness evidence was directed in relation to it. As the EAT has observed several times, that may be a hazardous, and sometimes the wrong, course to take, if in

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the given case time points cannot properly fairly be determined at a PH. A case where it is argued that complaints that would otherwise be out of time, are in time because they form part of a continuing act together with later complaints, is the most common example.

76. But in this case, the decision to direct witness evidence was not itself challenged. I also do not agree with Mr Brown that the tribunal should have construed the proposed sexual harassment complaint in this case as being of a continuing act, together with the allegations of managers failing properly to investigate the initial allegation of sexual harassment, and tolerating the same up to the date of the resignation. There are two difficulties with that line of argument in this particular case.

77. Firstly, this was not the case articulated as the claimant's *factual* case in the original particulars of claim. The only matter there that could be said to go beyond the allegations of harassment as such by the HR colleague in March 2018, was the suggestion in the statement referred to in the particulars of claim that he had also made a false allegation against her; but that was not a matter that was later pursued. Nor do I agree with Mr Brown that the document tabled on 12 June 2019 advanced a clearly-articulated case of ongoing sexual harassment or harassment related to sex. The allegation that the original complaint was ignored does not by itself amount to an allegation that ignoring it was conduct that was itself either sexual or related to sex. The further reference to "continued harassment" again contains no particulars suggesting that that later treatment was either sexual or related to sex.

78. Secondly, I agree with Mr Curtis that the proper approach was for the tribunal to focus on the formal amendment application tabled in July 2019 by the claimant's solicitors along with the proposed amended particulars of claim and supporting witness statement. This was not a case of a litigant in person struggling to put flesh on the bones on her complaint, and the tribunal having to tease out what it was. This was a represented claimant whose solicitors set out the specific terms of her proposed amendment in the 22 July 2019 documents. That application did not advance a case that there was a continuing act of harassment. It clearly identified that the proposed complaint of

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harassment related specifically to the alleged harassment by the HR colleague in March 2018 referred to in paragraph 1 of the original particulars of claim. The case advanced on the time point was not that there was a continuing act, but, rather that it was just and equitable to extend time.

79. It appears that EJ Lancaster may have contemplated that the time points should be definitively determined by EJ Shulman, but it seems to me that he took the more appropriate course of considering whether the time points meant that the claimant had no reasonable prospect of success in this claim. He was entitled to take account of the failure of the claimant to raise this complaint in terms sooner than she did, bearing in mind the information he had about her having had access to legal advice from two firms of solicitors and her union at different points. As to the issues raised regarding her mental health problems, the judge was entitled to take account of the fact that there was no supporting medical evidence before him on the occasion of this hearing.

80. Regarding whether this was merely a relabelling application, it is true that the factual allegations were all set out in the statement supporting the original claim form. However, the raising of a complaint of harassment under section 26 in its own right gave rise to a potential significant additional exposure of the respondent to remedies if it proved to be well-founded; and the tribunal was also entitled to take account of the overall passage of time and the fact that the individual concerned had left the respondent's employment in April 2018.

81. Standing back, given that a freestanding complaint would have been out of time, the access to professional representation which the claimant had had between September and March, that no freestanding complaint was advanced until June, and that the individual concerned had left the respondent's employment in April of the previous year, these features taken together provided a proper basis for the tribunal, in exercise of its discretion, to refuse this particular application to amend. I cannot say that it was wrong to do so. Ground 2 therefore fails.

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82. I turn to ground 3, concerning the application to amend to introduce a complaint of victimisation. There was no suggestion in the statement supporting the original claim that the treatment complained of, in the period from April to November 2018, happened *because* the claimant had raised the April grievance. The reference in paragraph 24 to being "victimised" concerns the claimant allegedly being shown CCTV pictures at a disciplinary meeting, which she wrote made her feel that the company was spying on her, and was treating her differently from other employees. The natural reading is that she was using the word in its ordinarily English language meaning, to signify that she believed that she being unfairly picked on. There is no relation back here to the harassment grievance that she had raised in April. Similarly, in paragraph 26, the complaint about being singled out over an attendance matter is not related back to that grievance.

83. The tribunal was therefore entitled to take the view that the contention that all of this treatment was in the *legal* sense an act of victimisation was new. The **Equality Act** does, however, admit in section 39, of a claim of victimisation by way of constructive dismissal. That proposed complaint was therefore not as significantly out of time as the proposed new complaint of harassment.

84. I do not accept Mr Brown's submission that the causation point was merely technical. The causal link between the treatment and the protected act is an essential ingredient of the complaint. However, a further factor to be considered is what practical impact allowing the application to amend will have on the scope of the evidence to be prepared and presented in the case. That is the substantive consideration captured by the question of whether the application merely involves a relabelling. In this case, the claimant was only seeking to rely on factual allegations she had already made about the treatment, as such. The tribunal would need, if the amendment was allowed, to consider not only what happened but why it happened. But it is at least arguable that the evidential territory, in terms of the witnesses and the documents required, would essentially be the same as it would be, if all of these matters were in issue as part of the constructive unfair dismissal claim.

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85. Did the tribunal give sufficient and proper consideration to whether this was a relabelling when conducting the balancing exercise? As to that, at paragraph 9.3.5, the tribunal said:

> "… Although out of time the real issue in this case is that this is not a mere re-labelling. Time is however relevant, as is the lack of explanation for a delay, failure to issue promptly, steps taken by the Claimant to take advice, noting the case of **Virdi**."

86. That passage suggests that the tribunal's conclusion, that this was not a case of re-labelling, was a significant factor contributing to its decision, even though it does not return to it in the subsequent sub-paragraphs of paragraph 9.3.

87. I have come to the conclusion that, given the weight that it apparently attached to the re-labelling issue, it was incumbent on the tribunal to consider, and explain what it concluded about, the significance of allowing the amendment for the scope of the evidential and factual inquiry in this case. The tribunal did not consider that, or, if it did, did not explain what conclusion it had come to about it. Therefore, after some hesitation, I have come to the conclusion that this decision was not sufficiently reasoned or explained and therefore the appeal on ground 3 succeeds.

88. This aspect will have to be remitted to the tribunal for further consideration. That it because there is not only one possible answer to whether, on proper consideration of all the relevant features, this application to amend should be allowed. It will be open to the tribunal on fresh consideration either to grant or refuse the application to amend, provided that it does consider all relevant features with sufficient care and sufficiently explain its conclusion, whatever it may be.

Outcome

89. I therefore allow the appeal on ground 1, and quash the strike-out of the unfair dismissal claim. I will not remit that to the tribunal. I dismiss ground 2. The decision to refuse the application to amend to add a freestanding harassment claim under section 26 of the **Equality Act** therefore stands. I allow ground 3 and quash the decision to refuse the application to amend to advance a claim

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of victimisation. I will remit that question for fresh consideration by the tribunal, assuming of course that the claimant elects to maintain that application when the matter returns to the tribunal.

Remission

90. I have heard argument now as to whether, I should give any direction as to whether the application that I have remitted for fresh consideration, if still pursued, should or should not be considered by Judge Shulman.

91. Mr Brown invites me to direct that it be considered by another judge. He says there is no particular advantage to it being considered again by Judge Shulman and that, having regard to the fact that I have upheld ground 1 as well, and what I have said about some of the reasoning, there would be a legitimate concern as to the judge's ability to come to these matters with an entirely fresh eye. Mr Curtis does not submit that there would be any particular advantage to Judge Shulman determining the application if it is re-run but says there is no compelling reason to preclude him from doing so.

92. I agree that there would be no particular advantage to a re-run application being determined by Judge Shulman. Whilst I am sure that he could be trusted to take a professional approach, I think that, realistically, it would be a big ask of him to expect him to be able to clear his mind entirely of the views and conclusions that he reached first time around. In addition, as I have said, I do not think there is necessarily only one right answer to this application. It is important that, if it is re-run, whatever the outcome, both sides should have confidence that it has been given entirely fresh consideration, and directing that it be considered by another judge will help to serve that purpose.

93. I will therefore direct that, if this application is on remission pursued again by the claimant, it should be heard by any available judge as directed by the regional employment judge, other than Employment Judge Shulman.

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